No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1989

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NELSON P. FORDHAM - PETITIONER

VS.

THE OFFICE OF PERSONNEL MANAGEMENT
-RESPONDENT

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THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
PETITION FOR WRIT OF CETRIORARI

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Questions presented for review

(1) Is the constitution of the United States, that document the plaintiff was oathed to support and defend in WWII by the U. S. Navy, still in force and effect?

(2) If so, are the laws of the United States made in pursuance thereof under which the plaintiff enlisted and served; and all treaties made or which shall be made under the authority of the United States (the treaty of peace with Japan, effective 28, April 1952), the supreme law of the land.

(3) If questions (1) and (2) are answered in the affirmative, then, is the plaintiff's continuous military service without break as shown on official U. S.(Government) records as enlisted and enlisted/midshipman,

MMR[1], in the USNR, during WWII, from 23, October 1942, the date the U.S. Government officially sent notice to the plaintiff of his voluntary enlistment and his, (1-c), in the armed forces, classification. Is the plaintiffs U.S. Government certified (1-c) classification and enlistment to be considered, by this or any other court, different than the (1-c) classifications set down by the selective service system under the selective service act for those millions of men who were drafted and inducted into the Armed Forces for service on Active Duty? U.S. Naval record shows the plaintiff as an enlisted/mid- shipman, MMR, in the USNR and the plaintiff voluntarily accepted that appointment and was oathed, Subsequent to his enlistment and

[1]MMR equates to Merchant Marine Reserve, a part of the U.S. Navy under the Naval Reserve Act (US law applicable to the plaintiff) 1938: 52 Stat1180, Sel 301; 52Stat1182, Sec 305.

contracted active duty service, to the office of midshipman, MMR, in the USNR--E-2, dated 18, November 1942, effective on 27, October 1942, thru 3, April 1944, is this court or any other court to consider that the plaintiff was not an enlisted person in the military forces of the U.S. and on active duty under two pieces of U.S. law (Sel. Ser. Act; the declarations of war) and that his enlisted service is not creditable even though all enlisted service, "is counted as service under that enlistment or period of obligation"(see last sentence, 10 USC 516(b) 1983 ED). 3 April 1944, is the date of his graduation from midshipman school and his voluntary acceptance of his commission and oath under superseding orders as ensign in the USNR, on 3 April 1944, without any breaks in service as shown in the pertinent parts of original US Naval record furnished the plaintiff with his

letter orders of honorable discharge, creditable military service for all the benefits of the Veterans Preference Act of 1944[1] and those parts of that act now administered by OPM under 5USC 2108; 3309 and other sections? (4) Is the plaintiffs military service as an officer in the USNR, during WWII, from 3 April 1944, no break in service, until 1 January 1951, the effective date of his transfer to an inactive status list by letter orders, creditable military service for all the benefits of the Veterans Preference Act of 1944 and those parts of that act now administered by OPM under 5 USC 2108, 3309 and other sections?

(5) If question (1) is answered in the affirmative; and art. I sec 8, cl

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[1]The plaintiff has a valid Veterans Administration file number issued in 1970; and a home loan certificate issued Jan. 1976, issued under the Veterans Preference Act of 1944, and those parts now administered by the Veterans Administration. Here ladies and gentlemen of the court, a Fax Paus exists.

18; and art. II, sec 2, cl 1 of the constitution have not been repealed; and unreconstructed official US government records and awards by the US Navy that have led the plaintiff to believe he served on active duty in WWII under laws proper for carrying into execution the foregoing powers (cite 'constitution provision involved) by this constitution in the government of the United States; or in any department (US Navy); or officer (US Naval or other) thereof. The question arises, the plaintiff was awarded the military WWII victory medal by the Bureau of Naval Personnel on 14 February 1973 and that medal under United States law (59Stat461) could only be awarded to persons who served on active duty in the Armed Forces of the US in WWII; and who were honorably discharged. See letter orders of honorable discharge at, also

letter Mr. Frederick Heath OPM to congressman Bennett: also DOD's, Mr. Niederlehners letter to Senator Hawkins, noted in appellate court decision 86-1625 attached. This medal was awarded under legal regulations, the US Navy's medals and awards manual, SECNAVINST 1650.ID, in force at time of award; and Assistant Secretary of the Navy's Decision in 1971. Does not this recorded evidence of the award of this medal by the US Navy, make clear and irrefutable under US law and legal regulations of the US Navy that the plaintiff served on active duty during WWII?

(6) A second question dealing with WWII military campaign medals awarded the plaintiff by The Bureau of Naval Personnel on 14 February 1973. Under the constitution, Art II, sec 2, cl 1; it is stated: The president shall be commander in chief of the army and navy

of the United States when called into actual service of the United States. This was in fact so, the president was commander in chief of the armed forces in WWII, there should be no contention that in WWII everyone classified (I-C) by the selective service system was called or ordered into active duty service of the United States, and Exec. Ord. 9265 was in fact direct orders to be obeyed immediately by the Armed Forces. Does not the award of three military area campaign medals, that require active duty, under Exec Ord 9265, legal US Navy regulations 1650.1d; and Assistant Secretary of the Navy decision in 1971, a minimum of 30 days in each area, prove beyond any resonable doubt the plaintiff served as an enlisted/midshipman in the USNR on active duty, before the enemy in excess of 90 days required by the Veterans Preference Act of 1944, and those parts

now administered by the V.A. or OPM.

(7) Can the US Navy, OPM, MSPB or the appellate court determine the plaintiffs legal entitlements under statutes, law or regulations that were not written or in force at the time the actions took place; and have no applicability to USNR service prior to 1956. The plaintiff was completely severed from all obligated military service required under the Selective Service Act of 1940, as amended 1942 and 1943; all military service under his enlistment contract; and the stipulations in the law under which he accepted and was oathed to his commission as an officer in the USNR, by Honorable Discharge with an effective date of 15 October 1954.

(8) Are decision of the United States, specifically, the comptroller General of the United States, that have been determined enforceable by courts

of the United States under 31 USC71; published recorded decisions of the US Navy, statutes, laws and legal regulations under which the plaintiff served; and official original certified US Government documented records of facts made under these recorded decisions and furnished the plaintiff with his honorable discharge, statutes, laws, and legal regulations, not to be considered primary evidence over incompletely reconstructed US Navy records; use of inapplicable statute; law; and inapplicable precedent; and regulation promulgated after the actions were completed?

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## Table of Authorities

Cases

1) There is no court ruled, specific precedents to this case to the plaintiffs knowledge and belief. However, this court has made a similar determination relative to a retired military officer, Badeau V. United States, 130us439 where in it is stated:

IF it is incompatible and against the general policy of the law, (and it is against the general policy of the law. Dual compensation act)(par. add) for a retired officer, who is only subject to the rules and articles of war and certain limited other incidents of military service to hold civil office in a foreign country, obviously any appointment IN the civil branch of the government would be incompatible with service on the ACTIVE LIST of the Army (Navy, Active registers of officers USNR)(Par. Add.). The fact

that during hours of relaxation or relief from actual performance of duties the individual has time to devote to his personal affairs and that normally (in peacetime)(par. Add.) such time is available for the performance of other duties is not the test.

Compatibility is determined by the individuals freedom to perform both services, the one without interference from the other, *the superior - the controlling obligation to render military service (enlistment-midshipman-officer in the USNR in war)(Par. Add.) thus makes impossible the acceptance without qualification of another obligation to the government to render service in a civilian capacity at the same time. (Dual compensation act)(Par. Add.) The time of one in the military service (oath of office signed by plaintiff specifically states: Midshipman, MMR IN

the USNR. Ensign In the USNR and both are in wartime, and nowhere on those official documents is inactive duty stated or alluded to, further the congress of the US in 55stat795; 55stat796 and 55stat797, the declarations of war, directed the president, the commander in chief of the Armed forces "to employ the entire naval forces of the US to carry on war")(Par. Add.) is not his own (Enlisted, midshipman, MMR In the USNR, ensign in the USNR, 7 days per week 24 hours per day, 365 days per year, required to wear the uniforms of those ratings, required to obey all orders verbal or otherwise issued by those naval officers set over me) (Par. Add) However, limited the duties of that particular assignment may be (ordered and assigned to USMMA by bureau of naval personnel via the Office of Naval Officer Procurement to serve in this

assignment and it was at the pleasure of the secretary of the US Navy. (See comp Gen 21cg121)(par. Add) and any arrangement or agreement for the rendition of services to the government in another position or employment is incompatible with his military duties (in wartime)(Par. Add.) Actual or potential (military duties on enlistment was to fight a war in some capacity and to pick the service I wished to serve which as allowed by the Sel Ser Act of 1940 and as amended 1942, 1943, on being appointed a midshipman, MMR in the USNR was to be educated to become an officer in the USNR, however, in my 3rd classmans semester at USMMA, I was ordered and assigned to a vessel that was armed, thus a ship of war and on that vessel I was assigned further as a gunner by the Naval officer assigned to that vessel as gunnery officer, as well as

engineering duties and sea projects to be completed in accordance with the curriculum set up at USMMA. On this particular vessel during this one deployment I served in every naval campaign area, at sea, before the enemy as an Enlisted/Midshipman, MMR in the USNR.)(par. Add.)

Other sources

2) published rulings of the government and US Navy under which the plaintiff served.

(a) Letter, Admiral Nimitz, Chief of the Bureau of Navigation to the Secretary of the US Navy, the honorable, Frank Knox, Dated 9 June, 1941.

(b) Secretary Knox approval of Admiral Nimitz proposition dated 18 June, 1941; this approval was received on 1 July, 1941, in the Navy Departments, Secretary's office records division.

(c) Army and Navy journal, dated 21 June, 1941, titled "Merchant Marine", column titled "Merchant Marine"

(d) The Comptroller General of the United States holding 21cg121 b17775, dated 12 August. 1941, United States decision titled, "Pensions compensation, retirement pay, hospital benefits, and death gratuities-Naval reservists on Active Duty."

(e) Direct quotations from 10 USC, 1970 ed; page 1798

(1) "The revised section also covers midshipmen of the Naval Reserve, although they are not covered by the specific wording of 34USC855(c)(-1)".

(2) The Comptroller General of the U.S. held in comp gen 21cg121 that 34USC855 before amendment (that applicable to the plaintiff) was applicable to midshipmen in the USNR, and the wording of that section was

similar to the wording of 34 USC855 (c)-(i).

(3) The judge advocate general of the US Navy, in cmo5, 1951, 149 held that reserve midshipmen are covered by 34 USC855(c)-(i).

3) U.S. laws under which the plaintiff voluntarily enlisted and served.

(a) Selective Service Act of 1940, as amended 1941; 1943.

(b) Naval Reserve Act of 1938.

(c) Declarations of war, 9th and 11th Dec. 1941.

4) Laws, Legal regulations and decisions of the US Navy under which the plaintiff was awarded military medals for active duty service.

(a) 59 stat 461 of 6 July 1945.

(b) Exec Ord. 9265 of

(c) US Navy's Medals and Awards Manual, SECNAVINST. 1650.Id of 17 dec 1968.

5) 10USCA501, 502, 503 and 517, (a) and

(b). 1983 ed. titled General Military law, subt. A, ch 31, enlistments, and notes under.

6) 10 USCA971 notes on decisions, 1989 pocket changes, titled Armed Forces, Ch 49, miscellaneous prohibitions and penalties, and notes under.

7) 31USC71.

8) 10 USCA516; 516(a); AND 516(b).

Cases

(a) Bell V. U.S., ct cl 1961, 81 sct 1230, 366 US 393.

(b) 6 L. Ed, 2d 363.

(c) Pfile V. Corcoran, D.C. Colo, 1968, 287 F. supp 554.

(d) Even V. Clifford, D.C. Cal 1968, 287 F. supp 334.

(e) Comp Gen 21CG121, 12 August 1941.

(f) Leighton V. US, 1962, 159 ct cl 118.

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(g) Horner V. Jeffrey, 1987, 823 f2d (fed Cir).

(h) This courts opinion in the case of Badeau V. United States, 130 US 439.

(i) The Dual Compensation Act.

(j) Badeau V. U.S. 130 US 439.

PETITION FOR A WRIT OF CERTIORARI
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

Pro-Se Petitioner, Nelson P. Fordham, respectfully prays that a writ of certiorari be issued to review the judgement and opinion of the United States Court of Appeals for the Federal Circuit entered in the above entitled cause on 11, October, 1989, a petition for rehearing was denied on 30 November 1989. Appendix (a) and (b), other appellate court holding attached as (c) and (d).

OPINION BELOW

The Court of Appeals affirmation of MSPB's two judgements; and that courts order of denial of rehearing are attached as Appendices (a) and (b) to this request.

II

JURISDICTION

"Rules of the Supreme Court, part V., jurisdiction on writ of certiorari Rule 17.1(a) and 17.1(c)." and the constitution Art. III, sec 2, cl 2.

CONSTITUTIONAL PROVISIONS INVOLVED

(1) Art. I, sec 8, cl 1 - "Congress shall have power to--provide for the common defense and genera welfare of the United States."

(2) Art. I, sec 8, cl 11 - "Congress shall have power to declare war."

(3) Art. I, sec 8, cl 13 - "Congress shall have power to provide and maintain a navy.

(4) Art. I, sec 8, cl 14 - "Congress shall have power to make rules for the government of the land and Naval Forces".

(5) Art I, sec 8, cl 18 - "Congress shall have power to make all

laws proper for carrying into execution the foregoing powers, and all other powers vested by this constitution in the government of the United States or in any department or officer there of."

(6) Art. II, sec 2, cl 1 - "The president shall be commander in chief of the Army and Navy of the United States, when called into actual service of the United States".

(7) Art. III, sec 2, cl 1 - "The judicial power shall extend to all cases in law and equity arising under the constitution, the laws of the United States, and treaties made, or which shall be made under their authority;---; to controversies to which the United States shall be a party;----;--a"

(8) Art. III, sec 2, cl 2 - "---. In all the other cases before mentioned the supreme court shall have appellate jurisdiction both as to law and fact,

with such acceptions and under such regulations as the congress shall make."

(9) Art. VI, cl 2 - "This constitution, and the laws of the United States which shall be made in pursuance there of; and all treaties made, or which shall be made under the authority of the United States, shall be the supreme law of the land; - - -.

IV

STATEMENTS OF FACTS

1) Fact: The plaintiffs entire military service was as a reservist in the US Naval Reserve and that service under his enlisted contract was for the duration of WWII plus 6 months, unless sooner released, transferred or discharged.

2) Fact: The US Government notified the plaintiff of his 20 October 1942 enlistment and his (I-C) classification, on 23 October 1942.

3) Fact: Enlistment is a contract and that contract was a voluntary act that changed the plaintiffs status in WWII from that of civilian to that of military but the change of status does not invalidate the contractual obligation of either party or prevent the contract from being upheld in a court of law. ((See 10USCA501; 1983.) Ed., General military law; subt A, ch 31, enlistments; notes on court decisions, note (3) contractual nature of enlistment, 3rd paragraph.)

4) Fact: "Military service" is defined in Blacks law dictionary, fourth edition, published 1951 as, "every branch of service in either the Armies or Navies of the U.S. (see Maclean V. Brodigan: 41 Nev 468,172,p375, 377; in reopinion to governor, 41 R.I 118, 102A, 913.

5) Fact: "Active military service" as defined in this same Blacks law, is

service at sea - - before the enemy in time of war" (See Redd V. American Cent. Life Insurance Co., 200 M.D. APP 383, 207 sw 74, 75; Rex Health and Accident Ins. Co., V. Pettiford, 74 Ind. APP 507, 129 N.E. 248.

6) Fact: At this point, according to US Government records, legal definitions and US Laws, the plaintiff was enlisted in the USNR, a branch of the Navies of the US, was under contract to serve for the duration of WWII plus 6 months, this service was Active Military service at sea before the enemy in time of war,

Fact: the duration of WWII was from 9 Dec 1941, at the declaration of war by congress, until the Treaty of Peace with Japan 1952, at the ratification of this treaty by congress (see 10USCA501, 1983 Ed., notes of decisions (3) contractual nature of enlistment; Bell V. US ct. cl. 1961, 81 Sct 1230, 366 us

393, 6 L. ed, 2d, 363; pfile V. Corcoran, D.C. colo, 1968, 287 F. supp 554; Even V. Clifford, D.C. Cal 1968, 287 f. Supp 334; and the constitution Art VI, cl 2) Now, if the constitution Art VI, cl 2, US law, the declarations of war on 9th 11th Dec 1941, stand as written and no semantics are entertained, the plaintiff was an active part of the "All naval force," employed by the US Navy 7 days per wk, 24 hrs. per day, 365 days per year, paid by the US Navy and was employed in the prosecution of WWII as an enlisted person; a midshipman; and officer in the USNR, all without a break in service.

Fact: On 18 November 1942, the plaintiff accepted an appointment and was oathed as midshipman, MMR, in the USNR, retroactive to 27 October 1942, thus without a break in service, between enlistment and appointment as a

midshipman, MMR, in the USNR, however, retaining his enlisted status as (E-2). (See US Naval record; 10USC516(a) the third 'or' clause; and comp gen decision 21cg121.)

Fact: The plaintiff met the criteria set down by Admiral Nimitz, Chief of the Bureau of Navigation, and approved by the secretary of the U.S. Navy, the honorable Frank Knox. He volunteered for active duty at enlistment. Some 7 days prior to the effective date of his appointment as midshipman, MMR, in the USNR.

Fact: The plaintiff met all the criteria, law, and regulations set down by compgen in 21 CG121 of 12 August 1941, on page 124.

Fact: As an enlisted/midshipman, MMR, in the USNR the plaintiff served on vessels to which he was regularly assigned, at sea, before the enemy in every campaign area in which the U.S.

Navy was involved and was awarded by the U.S. Navy, military area campaign medals for this service (the plaintiffs requested for some 14 medals by letter dated 21 June 1972, directed to the U.S. Navy's, Chief of Naval Personnel (pers p-53) that under ex ord. 9265 and the U.S. Navy's medals and awards manual, SECNAVISTR 1650.id required active duty and for a minimum of 30 days in each campaign area for award. Fact: If this court intends to invoke 10USC on the plaintiff, then 10 USC 516;(a) and (b) are more applicable than 100USC971. The plaintiff held an enlisted status; and an appointment as a midshipman, and a superceding appointment as Ensign, in the Naval Reserve accepted prior to 25 June 1956, was never a regular Navy person; was never appointed to any of four military academies mentioned in either 516 or 971; and accepted his appointment as

midshipman, MMR, in the USNR much prior to 25 June 1956, as delineated in 971(a). (See Leighton V. U.S., 1962, 159 ct cl 118).

Fact: The plaintiff served as an enlisted/midshipman, MMR, in the USNR from 27 October. 1942 until his completion of midshipman service, on 3 April 1944.

Fact: On 3 April 1944, the plaintiff accepted an appointment and was oathed to a commission as ensign in the USNR under a set of superseding orders Dated 15 March 1944, from the U.S. Navy without a break in service.

Fact: The plaintiff was notified by the U.S. Government with a set of letter orders from the U.S. Navy dated 1 June 1951, that he was transferred to U.S. Naval reserve officers inactive status list effective 1 January 1951, thus ending his active duty military service, however, holding the plaintiff

to his commitments and obligations accepted on enlistment under U.S. Law. duration plus six months.

Fact: The plaintiff was notified by the U.S. Government with a set of letter orders from the U.S. Navy dated 20 May 1955, that he was honorably discharged from the U.S. Naval Reserve effective 15 October 1954, thus completing all obligated service under the Selective Service Act, his enlistment contract, his appointment as midshipman and his appointment as an officer in the USNR.

Fact: On 21 June 1972, the plaintiff applied to the U.S. Navies, chief of Naval Personnel (Pers -p-53) for some 14 medals he believed he was eligible to be awarded.

Fact: By letter of award, dated 14 February 1973 the U.S. Navy's Chief of Naval Personnel with approval of the Chief of Naval Operations in fact

awarded the plaintiff (4) military medals from his list of (14).

Fact: Under U.S. law 59 stat 461 the WWII victory medal can only be awarded to persons who have served on Active Duty in the Armed Forces of the U.S. and have been honorably discharged. The plaintiff with this U.S. governmen record and his request for award has shown that the U.S. Navy awarded that medal and three other military medals that require 30 days in each of the area and on active duty, to him; and i fact determined his entitlement by virtue of picking only (4) medals from a requested (14); and by virtue of the plaintiff citing specifically the documents under which he requested those medals, the U.S. Navy was cognizant of the particulars for award The question here arises, do the court rule on recorded facts as official U.S government records certified as being

correct on 2 july 1985, by Admiral Larry G. Vogt, asst. Vice Chief of Nav Ops, or fiction, as that which the U.S. Navy would now like the government and the court to believe; the constitution Art VI cl 2 and laws 59 stat 461, made there- under: or opinions that have no law or legal regulation for back up as Admiral Larry G. Vogt, Assistant Vice Chief of Naval Operations, however, has done in his letter of 2 July 1985, admits that the plaintiff was furnished navy medals in 1973 and they were based on a decision by the assistant Secretary of the Navy, his superior who was the U.S. Navy, in 1971.

Fact: The appellate court, MSPB, OPM, and the U.S. Navy has impermissivly extended the bounds of 10usc971, 10USC971(a) 10USC971(b), (b)(1) and (b)(2) to include U.S. Naval Reservist who were completely separated from all obligated service and military service

prior to enactment of the source statute or law. 10USC971.

Fact: They have cited inapplicable precedent, Horner V. Jeffrey 823 F 2d (Fed. Cir. 1987).

Fact: Jeffrey was a midshipman (regular)(parenthesis added) attending the U.S. Naval Academy as a congressional appointee and was not enlisted;(see 10USC971 1989 Pocket edition) the plaintiff on the other hand was enlisted and a midshipman (reserve), his actual title as cited o the US Navys officially recorded document under oath is; midshipman, MMR, in the U.S. Naval Reserve E-2; "thus under the F.P.M. 296.1 APP 'B'-3 that time served as midshipman (reserve) is active duty military service while enlisted and assigned to and serving at the U.S. Merchant Marin Academy. The precedent speaks only an directly to a midshipman (regular) who

attended the U.S. Naval Academy and nothing more.

Fact: 10USC971(a) speaks to a circumstance similar to the plaintiff, The period of service under an enlistment or period of obligated service while also serving - - - in the Naval Reserve under an appointment accepted after 25 June 1956, may not be counted in computing for any purpose, the length of service of an officer of an armed force". However, this similarity ceases to exist when the plaintiffs factual, certified, U.S. Government selective service records and his original factual, Naval Military service records are cited., the plaintiffs service was much prior to 1956.

Fact: The plaintiff was notified by the government the selective service system of his voluntary enlistment in the Armed forces of the U.S. on 23 October

1942, and his classification (I-C), in the armed forces of the U.S.

Fact: Was appointed and took an oath o office as a midshipman, MMR, in the USNR upon which his enlistment is shown, as E-2, on 18 November 1942, back dated to 27 october 1942.

Fact At this point the plaintiff was a enlisted/midshipman MMR in the USNR an was paid as an E-2 under U.S. law.

Fact: On 3 April 1944 he finished midshipman school.

Fact: On this same 3 april 1944 date, without a break in service, between midshipman and Ensign in the USNR, and under a set of superseding orders, accepted and was oathed to a second appointment, that of Ensign in the USNR.

Fact: Effective on 1 January 1951, on set of letter orders he was transferre to an inactive status list.

Fact: There after effective on 15

October 1954 by letter orders was honorably discharged from the USNR.
Fact: The plaintiff was completely severed from his obligated military service required under the selective service act; his obligation under his enlistment contract and his two appointments accepted under oath and U.S. laws, the first being as "midshipman, MMR, in the USNR" on 27 October 1942; the second being "Ensign in the USNR" on 3 april 1944, without a break in service and extended until 1 January 1951, the effective date of his transfer to an inactive status list.
Fact: The plaintiff was awarded for this active duty military service four military medals that required active duty for award and one, under statue requires honorable discharge.
Fact: The enlistment contract and subsequent appointments with oaths were for the duration of WWII plus six

months unless sooner released, transferred or discharged.

Fact: The plaintiff was in accordance with a set of letter orders dated 20 May, 1955, Honorably discharged from the USNR effective 15 October, 1954.

Fact: 10USC971 (b)(1) and 10USC971(b)(2); speak only and directl to the four United States Military Academies and nothing more, and is therefore inapplicable, the plaintiff did not attend any of the four militar academies. These statements of fact ar made here to show there is no merit in The US Navy's, OPM's MSPB's or in the appellate courts judgement and that misconceptions and use of improper statutes, laws, government and navy ruled precedent (in this particular case there is presently no court ruled specific precedent to the best of my knowledge and belief) and officially documented and recorded facts, has

produced decisions that transgress the constitution, statutes, laws, legal regulations, several documented and published decisions of the Comp Gen of the U.S. and the US Navy and documented original factual records of several departments and agencies of the United States.

Fact: The documented titles on the factual original records held by the plaintiff and, cited in the oaths are the only titles admissible. As neither the courts, the Navy, MSPB or myself can change the official records without fact or law to back up the change.

Fact: Ladies and Gentlemen of the court, you must separate the facts(records) from the fiction and opinionated evidence, and apply to the original official records of fact, the statutes, laws, legal regulations, U.S. Government and the U.S. Navy precedent under which the plaintiff served and

which the actions were taken at the time of that service and those actions.

ARGUMENT

This affidavit sets forth the plaintiffs status as a veteran under the constitution; statutes; laws; Exec orders; legal regulations; and official U.S. Government records and decisions. (1) The plaintiff's selective service system record as presently held by the government. This official record introduces a constitutional problem, for, under Art I, sec 8, cl 1; the congress of the U.S. did in fact and law, the selective service act of 1940 as amended 1942, 1943, "provide for the common defense and the general welfare of the United States", with total mobilization of military forces and civilian enterprises. Cite the title of the act, 54 Stat 885, ch 720, of 16 September 1940, and reinforced that act and common defense of the United States

with the declarations of war on 9th and 11th December 1941.

(2) Original U.S. Naval records.

(a) Appointment and oath of office as :"midshipman, MMR, in the USNR", upon which is shown the plaintiffs enlisted rating, "E-2", dated 18 November 1942, back dated to 27 October 1942, thus under this official U.S. Naval appointment the plaintiff was in fact serving as an enlisted/midshipman, MMR, in the USNR. At this point a number of constitutional questions arise under: Art I, Sec 8, cl 1; Art I, sec 8, cl 11; Art I, sec 8, cl 14; Art I, sec 8, cl 18; Art III, sec 2, cl 2; and Art VI, cl 2.

(1) Under Art I, sec 8, cl 1 The congress did in fact and law, the selective service act of 1940 as amended 1942; 1943,"provide for common defense and general welfare of the U.S." by requiring all males 18-45 yrs.

to register and be classified by the selective service system, however, no barring voluntary enlistment. A certified U.S. government selective service record shows the plaintiff wa indeed enlisted; notification of that enlistment was sent by the government on 23 October 1942; He was indeed classified (I-C) a member of the arme forces of the US by virtue of this (I-C) classification was, in the arme forces of the U.S. as was the other millions of men either inducted or enlisted under the Sel. Ser Act durin WWII; and he was serving at USMMA in 1943. However, there is a second official U.S. government record, a U. Naval record that shows he was indeed enlisted, and his enlisted rating was on 18 November 1942, that of an E-2; and on this same date 18 November 194 he accepted an appointment and took a oath of office as a midshipman, MMR,

the USNR (Reserve) that was retroactive to 27 October 1942, as midshipman, MMR, in the USNR, and under the Naval Reserve act of 1938 either of these reserved statutes were in the Naval reserves and on active duty during WWII (cite compGen 21cg121), in WWII, he was employed by the U.S. Navy and paid by the U.S. Navy.

(2) Under Art I, sec 8, cl 11, The congress of the U.S. did in fact and law exercise another power delegated to them by constitution and "declared war" on the 9th and 11th Dec. 1941, 55 Stat 795; 55 Stat 796; 55 Stat 797 and under these U.S. laws which read in pertinent part"- - -, and the president is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the government to carry on war - -." The plaintiff was voluntarily a part of the "entire naval forces of the U.S." under

U.S. law, the naval reserve act of 1938, enlisted/midshipman, MMR, in the USNR. He was employed and paid by the U.S. Navy as an enlisted/midshipman (reserve); was appointed by the secretary of the navy to serve at his pleasure as midshipman, MMR, in the USNR, and was assigned by the U.S. Navy to serve as enlisted/midshipman at a naval school, The United States Merchant Marine Academy.

(3) Under Art I, sec 8, cl 14, The congress of the U.S. did in fact and law "make rules for the government of the land and Naval forces" and those rules(laws) were interpreted by the U.S. Navy; the comp gen of the U.S.; and OPM. The statutes; laws; and legal regulations applicable to the plaintiff at the time of this service are:

(a) Sel. Ser. Act of 1940 as amended 1942, and 1943.

(b) The Naval Reserve Act of 1938.

(c) 34USC855.

(d) An Act, 55stat797, ch 5656, 12 December 1941.

(e) The articles of war, the Act of 29 Aug 1916, as amended (40stat 717).

(f) The act of 26 May 1906, as amended (50Stat547)

(g) An Act, 55stat799, ch 570, 13 December 1941.

(h) An Act, 55Stat603, ch 320, 24 July 1941.

(i) An Act, 56Stat463, 30 June 1942.

(j) U.S. Naval regulations, ch 8, para 0801.

(k) U.S. Naval regulations, ch 11, para's 1101 and 1104.

(l) Glossary, ch 1, titled, "persons in the naval service".

Holdings of the United States applicable to the plaintiff at the time of service are:

(a) The U.S. Navy

(1) the U.S. Navy's Chief of the Bureau of Navigation, Admiral Chester W. Nimitz in a letter dated 9 June 1941 addressed to the secretary of the U.S. Navy, Mr. Frank Knox.

(2) Approval of admiral Nimit interpretation by Mr. Knox dated 18 June 1941.

Citation of that request and approval in part: "Authority is requested to appoint as midshipman in the merchant marine reserve (Merchant marine reserve is a part of the U.S. Navy under the Naval Reserve Act of 1938) All cadets, merchant marine reserve who are serving in vessels taken over by the Navy and who volunteer for active duty." Enlistme under the selective service act and shown on that record was voluntary (s 10USCA501, 1983 Ed., notes of

decisions, (1) laws governing; (2) power of congress; (3) contractual nature of enlistment) and prior to my appointment as midshipman, MMR, in the USNR, and under 10USC516(a) "that enlistment and obligated service could not be terminated because of that appointment", further, "if he is a midshipman in the naval reserve he is entitled to the compensation and emoluments of a midshipman in the naval reserve." Thus as an enlisted/midshipman oathed in the naval reserve and having served in ships of war before the enemy in every military campaign area and awarded military campaign medals for such service.

A third decision by the U.S. Navy as published in "the Army and Navy journal", dated 21 June 1941. Quote in pertinent part: "- - - By decision of the navy <u>to call in all</u> members of the

merchant marine reserve and - - -." "announcing that merchant marine reserve officers would be called to active duty without their consent and those now on duty would be retained". Midshipman are officers of the line, 9th in rank under U.S. Law; naval regulations, and U.S. court determinations.

(4) A decision by the comptroller general of the United States: Compgen 21CG121, B17775, dated 12 August 1941. Titled, "Pensions, compensation, retirement pay, hospital benefits and death gratuities-Naval Reservists on active duty." by very title, this decision by the U.S. Government is only applicable to naval reservists on active duty. Quote in pertinent parts: On page 121 the compgen states: "Naval reserve aviation cadets, Merchant Marine Cadets, and Naval reserve midshipmen are entitled to the

pensions, compensations, retirement pay, hospital benefits, and death gratuities provided by sect(4) of the Act of 27 August 1940, as amended - - -" Thus ladies and gentlemen of the court, under this part of that decision by the government, whether I was a merchant marine cadet as the government contends or a naval reserve enlisted/midshipman as the selective service and the U.S. Naval records show, I was on active duty and entitled to those benefits cited. On page 124 the compgen states: "Under section 305 of the naval reserve act of 1938; 34USC855, merchant marine cadets and midshipmen are authorized to be appointed to serve during the pleasure of the Secretary of the Navy." (A temporary appointment)(parenthesis added)" under naval reserve regulations, preliminary to appointment as midshipmen, U.S. Naval Reserve,

enlistments are required to be made in the rating of apprentice seaman" (I have shown by use of facts, two government records, that I voluntarily enlisted and that enlistment was prior to/ preliminary to my appointment as a midshipman, MMR, in the USNR)(parenthesis added)" and appointments therein under the regulations are made only during times of threatened emergency in accordance with instructions issued by the Bureau of Navigation in separate publications "I have cited to this court instructions issued by the Bureau of Navigations, Admiral Nimitz, and approved by the Secretary of the U.S. Navy, Mr. Frank Knox, in separate publications, there should by no doubt that WWII was a time of threatened emergency, therefore I have met all t criteria set down by: the compgen; th Naval Reserve Act of 1938; 34usc855;

Naval regulations; instructions issued by the Bureau of Navigation approved by the secretary of the navy, in force at the time of the actions, with officially recorded records of facts. These recorded facts are not from only one department of government but several thus active duty has been shown to exist. Now, ladies and gentlemen of the court, all compgen decisions are legally binding and enforceable on all departments and agencies of government under 31USC71 as determined by the U.S. court of claims in the case of "Wilson Vs. U.S." ct cl no 324-81c of 23 October 1981 and is so published in: Emphasis and trends, vol 15, no. 1, Jan.-Feb. 1982, issued by: the southern field division, naval civilian personnel command, Norfolk, VA.

OPM decision as reflected in the federal personnel manual at supplement 296-31, appendix b-30 that was in force

at the time of the plaintiffs retirement from civil service; States: "Midshipman(reserve) service between 8 September 1939, and 1946, while attending midshipman schools" is "uniformed service for Veterans Preference." The plaintiff has shown with U.S. government records that he i fact was an enlisted/midshipman betwee 1939 and 1946. The U.S. Navy's "register of commissioned and warrant officers of the USNR" dated 31 July 1944, shows that the school he attende was a Naval school, thus, under this U.S. government legal regulation the plaintiff was on active duty.

Under the constitution, Art I, se 8, cl 18; Art II, sec 2, cl 1; Art I, sec 8, cl 14 and Art VI, cl 2. By the letter of award dated 14 February 1973 The Department of the Navy, Bureau of Naval personnel, Washington, D.C. awarded the plaintiff (4) military

medals, the WWII victory medal, The American Campaign service medal, The European-African-Middle eastern campaign medal and the Asiatic-pacific campaign medal.

I will speak first to the WWII victory medal, the congress exercised its power under the constitution, Art I, sec 8, cl 14; Art I sec 8, cl 18. Under Art I, sec 8, cl 18 congress made law, specifically, 59Stat461 of 6 July 1945, that states in pertinent part: "-to be awarded to all persons who shall have served on active duty in the armed forces of the U.S. - - - at any time during the period beginning 7 December, 1941, and ending with the date of hostilities in the present war, and whos service shall have been honorable." In that statute, 59Stat461 congress delegated it's authority to prescribe regulations under the constitution, Art I, sec 8, cl 14, to

the secretary of the navy, who in fact did prescribe legal regulations, however, not in accordance with that statute 59Stat461. The U.S. Navy's regulations for award of the WWII victory medal under that statute were; department of the Navy, office of the secretary, Washington, D.C., SecNavIns 1650.ID of 17 December 1968, Pages (1) and (4-18), para. (8). However, the plaintiff to meet all the criteria set down by the congress in 59Stat461 written under the constitution, Art I, sec 8, cl 18; Art I, sec 8, cl 14; the plaintiff cited his original letter orders of honorable discharge dated 20 May 1955. Ladies and gentlemen of the court, if the constitution, Art VI, cl2, and the laws, 59Stat461, "which shall be made in pursuance thereof shall be the supreme law of the land;" and the plaintiff supplies this court with an official copy of a U.S. Naval

record wherein he was awarded the WWII victory medal on 14 February 1973, (before any loss of his official record) by the Navy's, Bureau of Naval personnel under the Navy's legal regulations 1650.ID then in force and the navy's assistant secretary of the Navy who is the U.S. Navy, official decision that had its basis in the Naval Reserve Act of 1938, and so states. Clearly these official U.S. naval records and United States law 59Stat461 indicates the plaintiff served on active duty and was honorably discharged from service that occurred in WWII.

I now speak to the military award of three area campaign medals awarded on that same letter of award by the Navy's, Bureau of Naval personnel, dated 14 February 1973. The constitution of the United States at Art II, sec 2, cl 1, States: "The

president shall be commander in chief of the Army and Navy of the United States - - -, when called into actual service of the United States." There should be no doubt that the U.S. Navy and its reserve were called into actu service of the United States in WWII, thus the president, was in fact Commander in Chief of the U.S. Navy a the exec orders issued by the Preside were in fact direct orders to the Arm Force, (see Am. Jur. military, page 195, para 13.) The presidential exec orders, the commander in chief of the armed forces orders, under which thes three medals were authorized are: Exec. order 9265 of 6 November 1942; and exec order 9706 of 15 March 1946. The U.S. Navy's legal regulations mad under these Ex. orders for award of those medals at the time of that acti is: The department of the navy, offi of the secretary, Washington, D.C.,

SecNavInst 1650.ID of 17 December 1968, pages (1),(4-16),(4-17),(4-18), para 7(a),(b); 7(1),(a),(b), (c); 7(2)(a)(b)(d), with the award of these three military area campaign medals the plaintiff meets the (90) day criteria set down in statute, The Veterans Preference Act of 1944, and is, provided official U.S. Naval records and law prevail, entitled to all the benefits of that act and those now administered by OPM or the V.A.

The plaintiff was issued by the Veterans Administration of A V.A. File No. (105-15-5267) in 1970 and of a home loan certificate by the VA(No. 4214691) issued to the plaintiff on 15 January 1976 under the Veterans Preference Act of 1944 and those parts administered by the VA at that time; a copy of VA verification of their records that show the plaintiff served on active duty, dated 7 December, 1981;

a copy, of a U.S. Navy captains verification under U.S. Navy seal, of VA records, Dated 8 December 1981.

REASONS FOR GRANTING THE WRIT

A/ This case provides this court with an opportunity to delineate the boundaries of 10USC971, 971(a), 971(b)(1) and 971(b)(2) with respect Naval Reservists who''s active duty service was all in WWII and prior to June 1956, not after 25 June 1956, as delineated in the law cited by the appellate court, MSPB and the U.S. Navy. The court of appeals for the Fed. Cir., MSPB, OPM and the U.S. Nav have impermissively extended the boun of 10USC971 to include persons who di not attend any of the four U.S. military academies and to Naval Reser officers who's obligated service and active duty military service was for the duration of WWII unless sooner release, transferred or discharged an

was completed prior to 25 June 1956, before the source and statutes or 10USC971 were enacted into law.

B/ This case provides this court with an opportunity to exercise its jurisdiction on writ of certiorari, Rule 17(a).

> "When a federal court of appeals has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such departure by a lower court, as to call for an exercise of this court's power of supervision."

C/ This case provides this court with an opportunity to exercise its jurisdiction on writ of certiorari, Rule 17(c).

"When a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this court."

D/ Statements and incomplete records elicited by the various defense attorneys in this case from the US Navy

and other departments of the governme
not supported by applicable laws or
legal decisions should have been
suppressed.

Any statement made in this case
should be backed up in law; legal
decision; or legal regulation; any
legal regulations presented as eviden
in this case should be those in force
and effect at the time the various
actions took place; and any record
presented as evidence must be
applicable to the case, complete and
true under the freedom of the
information act and the privacy act.
E/ This case provides this court with
an opportunity to determine whether
draft classifications and records mad
by the U.S. Governments Sel. Ser. Sys
under the Selective service act of
1940, as amended 1942 and 1943, in
wartime, are binding on all branches
the government as they were on the

entire civilian population and industries at the time.

CONCLUSION

This case presents important constitutional issues; important issues of original documented records of facts, law, legal regulations; and decisions of the United States, it's departments and agencies in force at the time the actions took place. Decisions is necessary regarding the exact boundaries to which the lower courts, departments and agencies of the government can take acception to the constitution; and laws made there under; and official US Government records as supplied the plaintiff and made under the constitution, laws and legal regulations.

This case regards US Naval reservists, who were enlisted and appointed Midshipmen and officers, in the USNR in WWII for the duration of

WWII plus six months.

This court here has an opportunity to clarify the limits and boundaries of acception, lower courts, departments, and agencies, may take to the constitution, records of facts, laws and legal regulations, and decisions of the U.S.

This case, if allowed to stand as ruled by the Court of Appeals for the Federal Circuit in violation of recorded facts, U.S. law and legal regulations, it's departments, agencies and officers, and decisions of the U.S. and its departments in force at the time of the actions establishes a dangerous precedent which if not clarified, other lower courts, departments, agencies and officers may chose to adopt.

Respect fully submitted,

Nelson P. Fordham (Pro-se)

# APPENDIX A

ORDER

Before NIES, Circuit Judge, BISSEL, Circuit Judge, and MAYER, Circuit Judge.

A petition for rehearing having been filed in this case, UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

FOR THE COURT,

_____
Francis X. Gindhart
Clerk

Dated: November 30, 1989

cc: NELSON P. FORDHAM
MICHAEL B. SUESSMANN

FORDHAM V OPM, 89-3249

**********
* Note: This order has not been *
* prepared for publication in a *
* reporter. *
**********

**NOT PREPARED FOR PUBLICATION IN A REPORTER**

Note: This judgement is not accompanied by an opinion prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

89-3249

NELSON P. FORDHAM
Petitioner,

V

OFFICE OF PERSONNEL MANAGEMENT
Respondent.

JUDGEMENT

MERIT SYSTEMS PROTECTION BOARD

No. AT08318810211-1

Per Curiam (NIES, BISSELL, and MAYER Circuit Judges):

AFFIRMED. See Fed. Cir. R. 36

ENTERED BY ORDER OF THE COURT

DATED_____ _____
Francis X. Gindhart, Clerk

# APPENDIX B

UNITED STATES OF AMERICA

MERIT SYSTEMS PROTECTION BOARD

ATLANTA REGIONAL OFFICE

| | |
|---|---|
| NELSON P. FORDHAM<br>Appellant,<br><br>V.<br><br>OFFICE OF PERSONNEL MANAGEMENT,<br>Agency. | DOCKET NUMBER<br>AT08318810211-1<br><br>DATE: MAR 01 1989 |

Nelson P. Fordham, Jacksonville, Florida, pro-se.

Murray M. Meeker, Esquire, Washington, DC, for the agency.

BEFORE

Richard P. Klein
Administrative Judge

INITIAL DECISION final 5 April 1989

INTRODUCTION

The appellant appealed to the Board on September 14, 1985, from the agency's (OPM's) August 21, 1985 reconsideration decision disallowing him credit for military service on the grounds that he had not proven that he

was on active duty. The January 10, 1986 initial decision in this case affirmed OPM's decision, and the Board denied appellant's petition for review on May 20, 1986. Initial Appeal file, Vol. 1 at tab 10 and Vol. 2 at tab 4; *Fordham v. Office of Personnel Management*, 21 M.S.P.R. 40 (1986) (table).

On February 3, 1987, the United States Court of Appeals for the Federa Circuit reversed the board and remande the case for further proceedings. Fordham V. Merit Systems Protection Board, 818 F.2d 876 (Fed. Cir. 1987) (table); First remand File, Vol. 1, Ta 1. The court indicated that the board could receive additional evidence from appellant and the agency, or it could remand the matter to the agency "for further investigation and reconsideration" in light of its opinion. Id. In view of the nature o

this case, the matter was remanded to OPM for further investigation and the issuance of a new reconsideration decision. Fordham v. Office of Personnel Management, MSPB Docket No. AT08318510830-1 (Initial Decision Apr. 8, 1987); First Remand File, Vol. 1, Tab. 2.

On January 4, 1988, the agency issued a new reconsideration decision. First Remand File, Vol. 2, Tab 1. This decision again found that appellant was not entitled to civil service retirement credit for the service which he performed between October 27, 1942, and June 30, 1949. Id. The appellant filed an appeal from the reconsideration decision with this office on January 22, 1988. Id.

However, during a status conference on March 22, 1988, the appellant stated that he has at all times since his retirement been giving

credit for the service in question. See id. at Tab 8. This was confirmed by OPM after reviewing the appellant's retirement records. Id. Thereafter, the appeal was dismissed as moot. Id. at Tab 11, Fordham v. Office of Personnel Management, MSPB Docket No. AT08318810211 (Initial Decision Apr. 12, 1988);

The case was remanded to the Board by the United States Court of Appeals for the Federal Circuit in a 2-1 decision finding that the appeal was not moot. Fordham v. Office of Personnel Management, No. 88-3289 (Fed Cir. Oct. 21, 1988); Second Remand File, Vol. 2, Tab. 2. The Board then remanded the case to this office. Fordham v. Office of Personnel Management, MSPB Docket No. AT08318810211 (Nov. 1, 1988). Second Remand File, Vol. 1, Tab. 1. The purpose of the remand was to allow the

Board to reevaluate the evidence and determine whether the appellant is entitled to credit for military service in connection with his Civil Service retirement benefits. Id. The parties agree that the period of time at issue is form October 27, 1942, until January 1, 1951.

BURDEN OF PROOF

As noted by the Federal Circuit in its initial remand of this case, the appellant has the burden to establish his entitlement to credit for this period of his military service. First Remand File, Vol. 1, Tab. 1. And, in that same decision, the Federal Circuit stated that the appellant is entitled to credit only for that time spent on active duty. Id.

ANALYSIS AND FINDINGS

1. The appellant's service as a Midshipman at the Merchant Marine Academy

from October 27, 1942, until April 3, 1944.

The parties stipulated during a January 4, 1989 telephonic status conference that the appellant was a Midshipman at the Merchant Marine Academy from October 27, 1942, until April 3, 1944.[1]

The law provides that in computing length of service for any purpose, "no

[1] In his response incorrectly dated December 10, 1989, and received on January 12, 1989, the appellant attached a copy of my January 5, 1989, Order summarizing the conference call. See Second Remand File, Vol. 2, Tab 16. The appellant's annotations on the order indicate that he was an enlisted midshipman in the United States Naval Reserve, Merchant Marine Reserve, serving at the Merchant Marine Academy from October 27, 1942, until april 4, 1944. Id. This annotation, however, does not represent the stipulation which was reached by the parties on January 4, 1989 -- January 5, 1989, order is correct in this regard. The annotation is obviously more precise and exact than the stipulation which was actually reached, but the agency did not agree or stipulate to this more specific language. And, the appellant does not allege that the more general language is incorrect.

officer of the Navy or Marine Corps may be credited with service as a midshipman at the United States Naval Academy or as a cadet at the United States Military Academy, United States Air Force Academy, or the United States Coast Guard Academy, if he was appointed as a midshipman or cadet after March 4, 1913...." 10 U.S.C. & 971(b)(1); see also Horner v. Jeffrey, 823 F.2d 1521, 1525 (Fed. Cir. 1987). Congress was convinced that, to do otherwise, would discriminate against the civilian appointee who pays for his own preliminary education and in favor of the military academy graduate who is educated for his commission at the expense of the government. Horner, 823 F.2d at 1526. And, the Federal Circuit subsequently enters government civil service retirement when he could not do so upon retirement from the military. Id.

The statute does not mention the Merchant Marine Academy. It does not specifically include, nor does it specifically exclude, the Merchant Marine Academy. And, I was unable to find any explanation for this situation. More importantly, I am unable to find any basis for ignoring the rationale for excluding service credit for time spent as a midshipman or cadet in these other military academies and granting service credit for time spent as a midshipman or cadet in these other military academies and granting service credit for time spent as a midshipman at the Merchant Marine Academy.

Even if this rationale does not apply to the appellant as a Midshipman at the Merchant Marine Academy, the fact remains that the evidence does not establish that he was on active duty during this time period. Nothing in

the record supports the conclusion that the time served by the appellant in the Merchant Marine Academy was active duty. Certainly, the appellant's military classification changed from Class I-A (eligible for service) to Class I-C (member of land or naval forces of the United States) immediately prior to his years at the Merchant Marine Academy. First Remand File, Vol. 2, Tab 10, Exhibit I. But, he is not entitled to credit for this service simply because he was a member of the land or naval forces of found it equally unfair for one educated at public expense who the United States. He has to establish that he was on active duty. And, clearly he has not.

In its first decision in this matter dated February 3, 1987, the Federal Circuit made reference to the Federal Personnel Manual, Supplement

296-31, Appendix B (B-30). First Remand File, Vol. 1, Tab 1. This provision indicates that midshipmen (reserve) service between September 8, 1939, and 1946, while attending midshipmen schools and service of Merchant Marine Reservists called to active duty in the Navy even though assigned to duty on merchant vessels or at shore establishments of the U.S. Maritime Service is creditable service.

In this regard, I note first that this particular section is no longer in effect. Secondly, I note that the Federal Personnel Manual stated for some time that service as a midshipman constitutes military service for credit purposes. See Jeffrey, 823 F.2d at 1529 n.12. But, in Jeffrey, the Federal Circuit declared the provision of the FPM regarding midshipman service invalid because it conflicted with 10 U.S.C. 971(b)(1).

There is also reference in the file to 46 U.S.C. 1126(f)(4) which provided that active service performed by any administrative enrollee at the Merchant Marine Academy prior to July 20, 1961, was creditable as civil employment in the executive branch. It does not appear that the appellant was an administrative enrollee for purposes of this section. More important, however, is the fact that 46 U.S.C. 1126 was repealed prior to the appellant's retirement by Pub. L. No. 96-453, 94 Stat. 2009 (1980).

I find that the appellant has not established by a preponderance of the evidence that he is entitled to service credit for purposes of his Civil Service retirement annuity for military service from October 27, 1942, until April 3, 1944.

2. The appellant's service in the United States Naval Reserve as a

Merchant Marine Reserve from April 4, 1944, to January 1, 1951 is not creditable.

The Parties stipulated during the January 4, 1989 conference call that the appellant was in the United States Naval Reserve as a Merchant Reserve from April 4, 1944, to January 1, 1951.[1]

While OPM and the Veterans Administration have, from time to time,

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[1]In his response incorrectly dated December 10, 1989, and received on January 12, 1989, the appellant attached a copy of my January 5, 1989, Order summarizing the conference call. See Remand File, Vol. 2, Tab 16. The appellant's annotations on this Order indicate that, during the period of time in question, he was in the United States Naval Reserve, as an Ensign (inactive). Id. This annotation, however, does not represent the stipulation which was reached by the parties on January 4, 1989--the January 5, 1989, order is correct in this regard. The annotation is obviously more precise and exact that the stipulation which was actually reached, but the agency did not agree or stipulate to this more specific language. And, the appellant does not allege that the more general language is incorrect.

determined that the appellant's service during all or part of the period of time in question was creditable and/or constituted active duty in the armed forces, the fact remains that the Department of Defense has never reached such a conclusion. Rather, its representatives have consistently found that the appellant's service was not active duty.[1] See, e.g., First Remand file, vol. 2, Tab 4, Agency File at Tabs 2A and 2D.

It is also interesting to note that the appellant's claim for service credit never once focuses on the types of duties he performed while on "active duty." Instead, the appellant, with on or two exceptions, argues in generalities. For example, he contends that there was no inactive military service in World War II and the the Congressional Declarations of War establish his entitlement to service

credit. These claims, with nothing more, are insufficient support for his position.

This is not to say that the appellant has presented no claims of any substance. In this regard, I note the appellant's argument that an August 12, 1941, decision of the Comptroller General (21 Comp. Gen. 121) entitles him to service credit. However, this decision concerns entitlement to certain military benefits -- it has nothing to do with civil service retirement benefits.

The appellant also claims that he is entitled to service credit based upon three campaign medals and the Victory Medal which he received in

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[1]Such determinations are arguably "wholly military matters." And, as such, may not be reviewable under current Board case law. See Siegert v Department of the Army, 38 M.S.P.R. 684, 690 (1988).

1973. For, he contends that such medals were awarded only for active duty. However, in a letter dated July 12, 1985, Larry G. Vogt, Assistant Vice Chief of Naval Operations, advised the appellant that these medals were awarded based on a decision by the Assistant Secretary of the Navy in 1971 concerning personnel who had Merchant Marine Reserve/U.S. Naval Reserve status during World War II. Id. at Tab 2A, enclosure 11. He noted, however, that the appellant did not serve on active duty. Id.

The Federal Circuit, on page 4 of its unpublished slip opinion in its initial remand dated February 3, 1987, noted that the Secretary of the Navy is authorized to award the World War II Victory Medal only to "persons who shall have served on active duty" during World War II "and whose service shall have been honorable" citing the

Act of July 6, 1945, ch. 275, 59 Stat
461. First Remand File, Vol. 1, Tab
While I agree that this is strong
prima facie evidence that the appella
served on active duty, that evidence
has been rebutted.

As noted in Vogt's letter to the
appellant, he is not entitled to a
Defense Form 214 (DD-214) because he
did not serve on active duty. The
appellant requested a DD-214 based up
his receipt of the Victory Medal. If
the appellant had actually served on
active duty, he would have been issue
such a form upon his discharge. Becau
he had no active duty, he was not
issued that form. DD-214's were issu
only to those individuals separated
from active-duty service. See id. at
Tab 2A, Enclosure 9, Navy regulation
at BUPERINST 1900.2.

I also note that the appellant,
his Application for Federal Employmen

which was signed and dated by P.B. Jackson on February 14, 1964, listed only his service as a Midshipman from October 1941[1] until April 1944 as active duty. See First Remand File, Vol. 2, Tab 10, Exhibit Q. The appellant argues that this does not reflect that he considered his service from April 1944 to January 1951 as something other than active duty. Rather, he contends that he saw no reason to include any additional service beyond that as a Midshipman because that service was sufficient to secure the 5-point veterans preference which he desired.

The appellant's argument is not at all persuasive. First, the application asks for <u>all</u> active service. Id. If the appellant believed he was on active duty beyond April 1944, it should have been included on this document. Secondly, the appellant indicates on

the application that he was not claiming 5-point veterans preference based upon wartime or peacetime federal service. Id. Thus, in my view, the appellant did not consider his service after April 1944, to be active duty. It was not until he received the medals that his pursuits in this area began.

In this regard, I also note that the appellant's original military record, which he signed on April 3, 1944, reflects that he was given a choice between applying for a commission as an ensign on active duty or as an ensign on inactive duty. See Second Remand File, Vol. 2, Tab 11, Attachment 5. And, he applied for the inactive duty position. Id. Moreover a copy of the appellant's original

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[1]During the January 4, 1989, conferenc call, the appellant acknowledged that this date should have been October 194 not October 1941.

maritime appointment letter which includes his "Acceptance and Oath of Office" dated and signed on April 4, 1944, reflects that he was indeed appointed to the position of Ensign, Engine (Inactive). Id. at Attachment 6.

I find that the appellant has not established by a preponderance of the evidence that he is entitled to service credit for purposes of his Civil Service retirement annuity for military service from April 4, 1944, to January 1, 1951.

DECISION

The agency's action is AFFIRMED.

FOR THE BOARD:

RICHARD P. KLEIN
Administrative Judge

NOTICE TO APPELLANT

This initial decision will become final on April 5, 1989, unless a petition for review is filed by that date or the Board reopens the case on

its own motion. This is an important date because it is the last day on which you can file a petition for review with the Board. The date on which the initial decision becomes final also controls when you can file petition for review with the Court of Appeals for the Federal Circuit. The paragraphs that follow tell you how a when to file with the Board or the federal court. These instructions ar important because if you wish to file petition, you must file within the proper time period.

BOARD REVIEW

You may request Board review of this initial decision by filing a petition for review. Your petition f review must state your objections to the initial decision, supported by references to applicable laws, regulations, and the record. You must fi your petition with:

The Clerk of the Board
Merit Systems Protection Board
1120 vermont Avenue, N.W., Suite 802
Washington, DC 20419

Your petition must be postmarked or hand-delivered no later than the date this initial decision becomes final. If you fail to provide a statement with your petition that you have either mailed or hand-delivered a copy of your petition to the agency, your petition will be rejected and returned to you.

JUDICIAL REVIEW

If you are dissatisfied with the Board's final decision, you may file a petition with:

The United States Court of Appeals
for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

You may not file your petition with the court before this decision becomes final. To be timely, your petition

must be received by the court no later than 30 calendar days after the date this initial decision becomes final.

NOTICE TO AGENCY/INTERVENOR

The agency or intervenor may file a petition for review of this initial decision in accordance with the Board's regulations.

# APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

88-3289

NELSON P. FORDHAM,

Petitioner,

v.

OFFICE OF PERSONNEL MANAGEMENT

Respondent.

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DECIDED: October 21, 1988

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Before NIES, BISSELL, and MAYER,

Circuit Judges.

NIES, Circuit Judge.

DECISION

Nelson P. Fordham appeals a decision of the Merit Systems

Protection Board (board) which held moot Fordham's claim for civil retirement credit for military service from October 27, 1942, through January 1, 1951. Fordham v. Office of Personnel Management, No. AT08318810211 (MSPB April 12, 1988). We vacate and remand.

OPINION

When this case was previously before us, we remanded for the board and OPM to reevaluate the evidence and determine Fordham's entitlement to credit for military service in connection with his pension benefits. OPM determined that Fordham was not entitled to such credit. However, the board dismissed his appeal as "moot" because Fordham's annuity payments have included credit for that service, albeit inadvertently. The payment was not the result of our mandate or a reasoned determination by OPM. The only OPM "decision" is that no credit

is allowable. We disagree, therefore, that the payment through inadvertency renders Fordham's controversy with OPM "moot." OPM's delay in implementing its decision to withdraw benefits may be likened to a stay of execution pending appeal. Accordingly, we vacate the board's decision and remand for consideration of the merits of OPM's decision.

Costs

Costs are awarded to petitioner.

MAYER, Circuit Judge dissenting.

I would affirm the Merit Systems Protection Board's conclusion that the case is moot.

# APPENDIX D

Note: This opinion will not be published in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent. The decision will appear in tables published periodically.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

| | | |
|---|---|---|
| NELSON P. FORDHAM, Petitioner, | ) | Appeal No. 86-1625 |
| v. | ) | |
| OFFICE OF PERSONNEL MANAGEMENT, Respondent. | ) | |

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DECIDED: February 3, 1987

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Before MARKEY, Chief Judge, DAVIS and NIES, Circuit Judges.

NIES, Circuit Judge.

DECISION

Nelson P. Fordham seeks review of the final decision of the Merit Systems Protection Board, Case No.

AT08318510830, which affirmed the decision of the Office of Personnel Management disallowing credit for Fordham's military service on the grounds that he failed to prove that he was ever on active duty. We reverse the board's decision and remand for further proceedings.

OPINION

It is uncontroverted that Fordham's military service records were destroyed in a major fire at the National Personnel Records Center in 1973. That loss has created his difficulties in establishing his entitlement to credit for military service.

Fordham asserts that he is entitled to credit for the period October 27, 1942, until March 30, 1944, as a Midshipman, Merchant Marine Reserve, in the United States Naval Reserve. During all or most of the

period at issue, Fordham was enrolled at the Merchant Marine Academy. The MSPB decision states that the law and the Federal Personnel Manual are clear that service a an "Enrollee-Trainee" at the Merchant Marine Academy is not active duty service. That is true but does not appear to apply here. The sole connection of an "Enrollee-Trainee" with the Federal Government is for the purpose of receiving personal training. (Record 332.) Fordham Maintains that he was not an "Enrollee-Trainee" and has submitted evidence that he enlisted in the Navy at age 20 in wartime and was assigned to that school. His draft board record confirms that on October 23, 1942, he was reclassified from 1-A to 1-C, the latter indicating that he was "Member of land or naval forces of United States"; that he "enlisted"; and the notation, "U.S. Merchant Marine

Academy" is accompanied by the date "April 23, 1943."[1] He also submitted a copy of his notarized oath of office as a "Midshipman" which includes his Navy serial number (181481 and specifies an "E-2" naval rating. (Record 244.)

In this connection Federal Personnel Manual, Supplement 296-31, Appendix B (B-30) indicates two categories of creditable service which the MSPB failed to consider: (1) Midshipman (Reserve), service between September 8, 1939 and 1946 while attending midshipmen schools.[2] (2)

[1]This record was loose in the file of this case. It cannot be determined whether or not it is part of official record below. However, that is immaterial in view of our disposition here.

[2]By letter of August 18, 1982, OPM advised the Navy that Fordham's time at the Academy was creditable towards retirement, and on August 29, 1975, the Navy so advised Fordham. No explanation for OPM's change of position is given. Nothing said here, however, should be taken to imply that time as a cadet at an academy should or must be treated as active duty or creditable time.

Under "Naval Reserve" "Merchant Marine Reservists (U.S. Navy Reserve) called to active duty in the Navy even though assigned to duty on merchant vessels or at shore establishments of the U.S. Maritime Service is considered active duty for preference purposes." (Emphasis added.) Thus, the resolution of Fordham's entitlement to credit for this period was not fully considered.

With respect to the period March 31, 1944, to January 1, 1951, in accordance with OPM advice, Fordham submitted official documentary evidence of this receipt of certain medals for his service and the statutory authority under which those medals were awarded. The Secretary of the Navy is authorized to award one of those medals, the World War II Victory Medal, only to "persons who shall have served on active duty" during World War II "and whose service shall be honorable." Act of July 6,

1945, ch. 275, 59 Stat. 461. As the General Counsel of the Department of Defense acknowledged in his letter of February 21, 1984, Fordham's receipt of that medal "constitutes very strong prima facie evidence of service on active duty . . . ." See Letter from Frederick Heath, OPM Area Manager, to Representative Bennett (June 27, 1984). Fordham also submitted his Honorable Discharge papers. (Record 82.)

The presiding official found that OPM overcame Fordham's prima facie showing: "Contrary to Mr. Fordham's argument and despite his reliance on the medals he received, the overwhelming contrary evidence indictates that he did not perform any active duty service." (Emphasis added.)

The "overwhelming evidence" identified by the presiding official consists of three letters. The first is a one-sentence memorandum dated

March 13, 1975, in which the National Personnel Records Center advised the Navy ad follows: "Records on file at this center do not show that officer performed any active duty during [sic] his service with the Merchant Marine Reserve - U.S. Naval Reserve."

In a July 22, 1975, letter to Fordham's agency employer (the Navy), OPM simply noted that the National Personnel Records Center had advised on March 13, 1975, "that records on file there did not show Mr. Fordham performed any active duty during his service . . . ."

Finally, by letter dated August 29, 1975, the Navy advised Fordham that he was given credit for his service as a Midshipman (Reserve) while attending midshipman's school from Oct. 27, 1942, to March 30, 1944, (citing the Federal Personnel Manual referenced above) and that, based on the above two letters,

his later years could not be verified as active duty.

In sum, the "overwhelming contrary evidence" relied upon by the Merit Systems Protection board consists of the 1975 statement of the National Personnel Records Center that their records "do not show" that Fordham performed active duty. Viewed in light of the admission of the Center that Fordham's records were destroyed in a 1973 fire, and there being no representation that his records have been reconstructed, that statement does not have the significance ascribed to it by the board. The Center has neither produced nor suggested that they have records showing that Fordham did not perform active duty. On the other hand, the medals Fordham received were awarded prior to the date of destruction of the records. Viewing records as a whole, substantial

evidence does not support the finding that Fordham performed no active duty service.

Contrary to Fordham's apparent understanding, however, there is no entitlement to credit for any period simply by reason of his status as a member of the active reserves. The creditable time is only that spent on active duty.

It is petitioner's burden to establish his entitlement. However, that burden is to be judged in light of the circumstance that the official records have been destroyed. The government cannot be relieved of its obligations by simply relying on the absence of official records. Thus, entitlement may be established here by other evidence and may have to be based on reasonable inferences to be drawn from probative evidence that is submitted, e.g., if any substantial

World War II entitlement is proved, then the entirety of the period of conflict may be covered, since there is no indication of a change in his status until thereafter.

On the other hand, the evidence Fordham has submitted indicates that he has no active duty service after June 30, 1949. The Navy's letter to Fordham, dated 1 June 1951, (Record 309), advised that he was transferred to the Inactive-Status List of Reserve Officers as of January, 1951, by reason of his failure to earn at least twelve retirement credits between 30 June 1949, and 21 December 1950.

On remand the board itself may receive additional evidence from petitioner and OPM, either documentary, testimonial, or by affidavits, or it may remand the matter to OPM for further investigation and reconsideration in light of this opinion.